IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. 86-1009

BESSIE W. COFFELT AND
KENNETH C. COFFELT ..... *Petitioners*

vs.

ARKANSAS STATE
HIGHWAY COMMISSION ..... *Respondent*

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARKANSAS

## BRIEF IN OPPOSITION
## TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

*WHETHER THE ARKANSAS SUPREME COURT PROPERLY DENIED THE APPEAL FROM A ZERO VERDICT IN A HIGHWAY CONDEMNATION CASE CONDEMNING THE LANDOWNERS UNDERLYING FEE BURDENED BY EASEMENTS FOR TWO HIGHWAYS.*

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF THE CASE

This case involves a requested review of the second appeal before the Supreme Court of Arkansas of a highway condemnation case. The property interest condemned is the underlying fee located *within the intersection* of a two lane county road and a four lane divided, fully controlled-access highway: a 20 foot by 300 foot parcel, the entire surface of which is burdened by easements for both a county road and an "interstate" type highway. A jury impaneled in accordance with Ark. Stat. Ann. §76-533 (Repl. 1981) returned a verdict finding that the just compensation due for the condemnation of the underlying fee, burdened by these two highway easements, is zero.

The facts are stated in three previous published opinions

of the Arkansas Supreme Court involving the condemned property. These decisions are reproduced in the appendix and the facts are summarized here.

In July, 1955, Mr. and Mrs. D'Angelo, predecessors in title to the current landowner, conveyed to Pulaski County an easement for the right of way for U.S. Highway 67. The easement bisected a parcel of land owned by the D'Angelos. The deed contained this language:

> This conveyance is made for the purpose of a freeway and adjacent frontage road and the grantor hereby releases and relinquishes to the grantee any and all other abutter's rights including rights appurtenant to grantor's remaining property in and to said freeway, provided, however, that such remaining property shall abut upon and have access to said frontage road which will be connected to the freeway only at such points as may be established by public authority.

On September 8, 1955, the D'Angelos conveyed their remaining interest in their 240 acre parcel by warranty deed to Kenneth and Bessie W. Coffelt. That deed stated:

> Subject to an easement for a road designated as Pickthorn Lane [later named Coffelt Road] that runs across the north side of said property, if said lane encroaches in any manner upon the above described property.
>
> Also subject to a perpetual easement for a right-of-way for State and U.S. Highway No. 67 through and over said land, which easement and right-of-way is particularly set forth and described in an instrument described as "Easement Deed" dated the 12th of July, 1955, executed by Horace D'Angelo and his wife Eleanor B. D'Angelo, to Pulaski County, Arkansas, which said deed is recorded in

> Book 578 at Page 437 of the Deed Records of Pulaski County, Arkansas. The highway right-of-way excepted from this conveyance and described in the Easement Deed above referred to contains 27.92 acres more or less in permanent right-of-way.

Mr. Coffelt subsequently conveyed his interest in the parcel to Mrs. Coffelt.

On December 16, 1955 the County Court of Pulaski County, without any record of notice to the Coffelts, entered an Order converting its easement for a controlled access highway into a fee taking.

As the north-south highway was constructed, entrance and exit ramps existed permitting entrance and exit to and from the highway upon the county road (then known as Coffelt Road) which ran east and west contiguous to the southern boundary of the Coffelt property on both sides of the highway. For a time, one could by numerous stops and starts, cross from west to east, and vice versa, directly from the Coffelt land on one side of the highway to the Coffelt land on the other side. It required stopping at each of the frontage roads and stopping prior to crossing each of the two double lanes of Highway 67.

Pulaski County transferred its interest in the right-of-way to the Arkansas State Highway Commission, and in 1972 Mrs. Coffelt sued the Commission to enjoin it from interfering with the Coffelt Road crossing, alleging the Commission was planning to close Coffelt Road and thus deny her direct access from her property on one side of the highway to her property on the other side.

The Arkansas Supreme Court ultimately affirmed injunctive relief awarded to Mrs. Coffelt. The Court held the

initial entry of the Commission on the land to construct the highway was consistent with the county's July, 1955 easement. Thus the initial construction was not notice that the Commission was claiming a fee and therefore Mrs. Coffelt was not barred by the one year statute of limitations from asserting her rights in the fee. See Ark. Stat. Ann. §76-926 (Repl. 1981). The taking of Mrs. Coffelt's interest remaining in the fee subject to the easement had to be re-condemned. The Arkansas Supreme Court said whether Mrs. Coffelt would be entitled to damages from taking the fee was a matter still to be determined. *Arkansas State Highway Commission* v. *Coffelt*, 257 Ark. 770, 520 S.W. 2d 294 (1975).

In 1985 the Arkansas State Highway Commission filed its Complaint and Declaration of Taking pursuant to Ark. Stat. Ann. §76-533 et. seq. to condemn the underlying fee in the intersection and remove the at grade crossing of the county road and the Freeway. In this first condemnation suit the trial court allowed the landowner's appraisal witnesses to value all of the property owner's adjacent property (they owned parcels on both sides of the "Interstate-type" road) as though the owner had a right of direct access to the main traveled lanes, a right lost with the condemnation of the underlying fee and the subsequent physical removal of the crossing. Damages to these remaining lands were assessed by the jury at $40,000.00.

On appeal the Arkansas Supreme Court held that the Coffelts had no right to ingress and egress the main traveled lanes of the Freeway since they had acquired their property subject to the existing easement for a controlled access highway. *Coffelt* v. *Arkansas State Highway Commission*, 285 Ark. 314, 686 S.W.2d 786 (1985). On retrial, and without any evidence concerning the effect of a loss of ingress and egress to the main traveled lanes, the Court had previously held the landowner never possessed, the jury returned a verdict of zero compensation.

This verdict was the subject of a second appeal. *Coffelt* v. *Arkansas State Highway Commission*, 289 Ark. 348, 712 S.W.2d 283 (1986). That appeal was denied for the appellant's failure to properly abstract the record in accordance with Arkansas Supreme Court Rule 9. The attorney in this case is married to the landowner. A written concurrence by Justice Hays stated that the appeal could be affirmed on its merits.

The decision on the second appeal is included in the abstract of the appellant's Petition. The first appeal, *Coffelt* v. *Arkansas State Highway Commission*, 285 Ark. 314, 686 S.W.2d 786 (March 25, 1985), the 1975 appeal on the original injunction, *Arkansas State Highway* v. *Coffelt*, 257 Ark. 770, 520 S.W.2d 244 (March 10, 1975), and the decision in a related case involving the same parties, *Arkansas State Highway Commission* v. *Coffelt*, 285 Ark. 431, 688 S.W.2d 282 (April 22, 1985) are included in the appendix here.

## REASONS FOR DENYING WRIT

The appellant in her Petition asserts four points justifying her request for certiorari.

The first two points are inter-related: whether a jury could *constitutionally* conclude that the fair market value of the landowner's 20 foot by 300 foot underlying fee, the whole surface of which is burdened by two road easements (one of which is for a fully controlled access highway facility) is zero. Any prohibition on allowing the jury to reach this conclusion ignores the economic reality that should her fee *in the intersection* somehow become unburdened by these existing roadways, the landowner's remaining property would be landlocked and essentially worthless.

In giving content to the just compensation requirement of the Fifth Amendment, this Court has sought to put the owner of condemned property "in as good a position pecuniarily as if his property has not been taken". *Olson* v. *United States*, 292 U.S. 246, 255, (1934). In applying this principle of indemnity the jury is guided by a relatively objective working rule. Normally the Court in instructing the jury employs the concept of "fair market value" to determine the condemnee's loss. See *United States* v. *Miller*, 317 U.S. 369, 374, (1943); *United States* v. *Cors*, 337 U.S. 325, 332, (1949). Under this standard, the owner is entitled to receive "what a willing buyer would pay in cash to a willing seller" at the time of the taking. *United States* v. *Miller*, 317 U.S. at 374; accord, *City of New York* v. *Sage*, 239 U.S. 57, 61, (1915); *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624, 633, (1961); *Almota Farmers & Elevator and Warehouse Co.* v. *United States*, 409 U.S. 470, 474, (1973). This is how the jury was instructed in this case.

In this case the jury simply chose to believe the State's expert appraisal witness that the underlying fee had no value

in the market and no contributory value to the landowner's remaining property,[1] instead of the property owner in her contention that she was damaged in the amount of $337,-000.00.[2] In her Petition to this Court no claim is made that she was unfairly restricted in her ability to press her case before the jury. "All that is essential is that, in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation; and when that has been provided there is that due process of law which is required by the Federal Constitution." *Appleby* v. *City of Buffalo*, 221 U.S. 524, 532 (1910). This standard is clearly met here.

The appellant's third point raises the question of the propriety of the Arkansas Supreme Court deciding this appeal with two of its seven members not participating. The Arkansas Supreme Court was expanded to seven members pursuant to Amendment Nine of the Constitution of the State of Arkansas (1876) and Ark. Stat. Ann. §§22-200 and 22-201 (Repl. 1962). Here four members affirmed the trial court which constitutes a decisional quorum under Arkansas law. Ark. Stat. Ann. §22-206 (Repl. 1962). There is no Federal Constitutional question presented.

Finally, the appellant raises an issue of the State Court's affirmance of her appeal finding "flagrant violation" of Rule 9 of the Arkansas Rules of the Supreme Court and the Court of Appeals. *Coffelt* v. *Arkansas State Highway Commission*, 289 Ark. 348, 712 S.W.2d 283 (1986): the attorney for the landowner (who is also her husband) failed to both abstract his record and itemize his points for reversal. As outlined in the opinion, the State Court has consistently applied this sanction for Rule 9 violations. The requirement that an appellant prepare a meaningful summary of the record is certainly not fundamentally unfair. In fact this Court has held that if a full and fair

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[1]T. 259-260

[2]T. 225

trial on the merits is provided, the Fourteenth Amendment does not require *any* appellate review. *Lindsey* v. *Normet*, 405 U.S. 56, (1972), *Bryant* v. *Akron Park District*, 281 U.S. 74 (1930). Therefore, no substantial constitutional questions are raised.

## CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

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# APPENDIX

# BESSIE W. COFFELT *v.* ARKANSAS STATE HIGHWAY COMMISSION

SUPREME COURT OF ARKANSAS
No. 84-268
Opinion Delivered March 25, 1985
Rehearing Denied April 29, 1985

285 Ark. 314
686 S.W.2d 786

DAVID NEWBERN, Justice. This appeal and cross appeal are from a condemnation judgment which, after a jury trial, awarded $40,000 to the appellant. It is the second appeal in the case, and as the first appeal was decided in this court, we have jurisdiction. Arkansas Supreme Court and Court of Appeals Rule 29. 1. j.

In July, 1955, Mr. and Mrs. D'Angelo conveyed to Pulaski County an easement for the right of way for State and U.S. Highway 67. The easement disected a parcel of land owned by the D'Angelos. The deed contained this language:

> This conveyance is made for the purpose of a freeway and adjacent frontage road and the grantor hereby releases and relinquishes to the grantee any and all other abutter's rights including rights appurtenant to grantor's remaining property in and to said freeway, provided, however, that such remaining property shall abut upon and have access to said frontage road which will be connected to the freeway only at such points as may be established by public authority.

On September 8, 1955, the D'Angelos conveyed their remaining interest in the parcel by warranty deed to Kenneth and Bessie W. Coffelt. Mr. Coffelt subsequently conveyed his interest in the parcel to Mrs. Coffelt.

As the north-south highway was constructed, entrance and exit ramps existed permitting entrance and exit to and from the highway upon a road known as Coffelt Road which runs east and west contiguous to the southern boundary of the Coffelt property on both sides of the highway. For a time, one could, by numerous stops and starts, cross from west to east, and vice versa, directly from the Coffelt land on one side of the highway to the Coffelt land on the other side. It required stopping at each of the frontage roads and stopping prior to crossing each of the two double lanes of Highway 67.

Pulaski County transferred its right in the easement to the Arkansas State Highway Commission, and in 1972 Mrs. Coffelt sued the Commission to enjoin it from interfering with the Coffelt Road crossing, alleging the Commission was planning to close Coffelt Road and thus deny her direct access from her property on one side of the highway to her property on the other side.

In her complaint Mrs. Coffelt alleged the Commission had promised to construct an overpass. While that point was apparently not pursued, it is mentioned here as an aid to understanding what is at stake in this case. Had an overpass or underpass been constructed permitting Coffelt Road to remain passable across the highway, Mrs. Coffelt would have had no claim against the Commission.

This court ultimately affirmed injunctive relief awarded to Mrs. Coffelt. We held the initial entry of the Commission on the land to construct the highway was consistent with its easement. Thus the initial construction was not notice that the Commission was taking the fee and therefore Mrs. Coffelt was not barred by a statute of limitations from asserting her right in the fee underlying the easement. The taking of Mrs. Coffelt's interest remaining in the fee under the easement will permit closing Coffelt Road where it crosses the highway. We said

whether Mrs. Coffelt would be entitled to damages from taking the fee was a matter yet to be determined. *Arkansas State Highway Commission* v. *Coffelt*, 257 Ark. 770, 520 S.W.2d 294 (1975).

That very matter was sought to be determined in the case before us now. The Commission sued to condemn the fee. In her appeal of the damages judgment in her favor, Mrs. Coffelt alleges she was erroneously prevented from giving her testimony as to the value of her land before and after the interruption of Coffelt Road. In the cross appeal the Commission contends the court erred in not granting a motion in limine, in refusing to strike expert testimony offered by Mrs. Coffelt's witness and in allowing Mrs. Coffelt to state that the court was taking judicial notice of the earlier chancery decree.

1. *Mrs. Coffelt's Testimony*

Mrs. Coffelt's attorney began his questioning of her by asking her generally about her land. She responded that her land on the east side of the highway was 2.9 acres and gave figures on its length, width and depth. She gave similar testimony about the approximately 20 acres on the other side where she and Mr. Coffelt had resided nearly thirty years. She discussed the topography of the land and its usefulness as commercial property, noting that at one corner she had an antique shop. She spoke of the lack of drainage problems and of the accessibility to city water and utilities. She also testified about the nearest access points to the highway from the frontage road and about the nature of nearby commercial uses.

When Mrs. Coffelt's lawyer then asked her the value of her land before taking, the Commission objected on the basis that Mrs. Coffelt was not shown to be an expert or to be qualified as a landowner to testify as to the value of her land. Her lawyer then asked her if she was "familiar with land values in that area generally, particularly commercial properties," to which she

responded in the negative. She was then asked if she were familiar "with the fair market value of these properties." The Commission again objected. Her lawyer then asked:

> Based upon the information you have, Mrs. Coffelt, do you have an opinion as to the fair market value of your property immediately prior to the taking?

Whereupon the judge said:

> Well, now I've got to sustain the objection, Mr. Worsham. I thought you were going to ask her some more questions about what she based her evaluation on.

More questions followed, but Mrs. Coffelt was not permitted to testify as to value, except to proffer her testimony out of the jury's presence.

While we can understand some of the confusion caused by questions asked of Mrs. Coffelt by her attorney which would more properly have been asked of an expert witness, it is clear that Mrs. Coffelt had shown sufficient knowledge of her own property to qualify her to state its value in her capacity as owner of the land.

On this point the Commission cites only *Arkansas State Highway Commission* v. *Darr*, 246 Ark. 204, 437 S.W.2d 463 (1969), in which a landowner's testimony as to the value of land was held to have been properly stricken. But there was no showing in that case that the witness had ever lived on the land. Nor was she asked about the fair market value of her land. Instead, she was asked how much the land was "worth" with no definition of "worth." She had also given statements about the land which were contradicted by other witnesses, and the evaluation reached in the judgment was entirely dependent on her testimony, as it was too high to have been based on the testimony of other witnesses.

In the case before us, it is clear that although there were other questions Mrs. Coffelt could not answer, the ones to which she quite adequately responded were sufficient to show she had a thorough knowledge of her land. In *Arkansas State Highway Commission* v. *Taylor*, 269 Ark. 458, 602 S.W.2d 657 (1980), we held that as long as a landowner demonstrates an intimate knowledge of his own property he may give his opinion as to its value, and he need not know the value of other, comparable properties. A demonstrated familiarity with his land is sufficient. *Arkansas State Highway Commission* v. *Duff*, 246 Ark. 922, 440 S.W.2d 563 (1969). Thus it was error for the court not to allow Mrs. Coffelt to testify with respect to the value of her land before and after the taking.

2. *Motion in Limine*

The Commission moved at the outset to prevent testimony having to do with diminution of the value of Mrs. Coffelt's land due to inability to enter the highway at its intersection with Coffelt Road. The motion was based on the deed from the D'Angelos to the county which had so clearly given up that right and to which their deed to the Coffelts made reference. We have no doubt the motion should have been granted.

Had there been a correct ruling on the motion in limine, the Commission's next point would have been obviated. Mr. Larrison testified for Mrs. Coffelt as an expert. The evaluation he gave was clearly based on failure to understand that the D'Angelos, and thus their successor Mrs. Coffelt, had conveyed away their right of access at the Coffelt Road intersection to Highway 67. Mr. Larrison said specifically his evaluation had been done on the basis of loss of such access and not just loss of the right to cross the highway from one side of the Coffelt land to the other. He was given an opportunity to separate the right to cross the highway from the right of direct access to the highway, and he was unable to do it, thus it was error to permit

Mr. Larrison's estimate to go the jury. *Arkansas State Highway Department* v. *Wallace*, 247 Ark. 157, 444 S.W.2d 685 (1969).

### 3. *Judicial Notice*

This point need only be discussed because it may come up upon retrial. As stated earlier, the only question in the first appeal in this case was whether a statute of limitations had run, preventing Mrs. Coffelt from seeking damages for condemnation of the fee underlying the easement across her land so as to permit closing Coffelt Road where it crossed the highway. We held the statute had not run. We said:

> We do not pass upon the effect of the various deeds on damages claimed in this case, but we are of the opinion the chancellor's finding that the appellee owns the fee title to at least twenty feet of Coffelt Road is not against the preponderance of the evidence. We conclude, therefore, that the chancellor did not err in granting the injunction until the question of damages, if any, is fully determined. [257 Ark. at 780, 520 S.W.2d at 300]

Our decision was thus a very narrow one; so was the chancellor's and yet the following exchange appears in the record in the case before us now:

> Your Honor, the defendants are preparing to rest. But before we do, I believe before the recess I had tendered a decree. Your Honor, at this time we are proposing to withdraw the decree because it's my undersanding the Court is taking judicial notice that a decree was entered on April 17, 1974, giving the defendants the right to the free use of Coffelt crossing and to the right of the ingress and egress on said Coffelt crossing and to the free flow of traffic thereon. Is that correct, Your Honor?

THE COURT: I'm so taking judicial notice.

This characterization of the earlier decree was thus at least possibly misleading. Two paragraphs of the chancellor's decree are set out in our earlier opinion 257 Ark. at 778, 520 S.W.2d at 299. The chancellor made it clear that Mrs. Coffelt had no right of access to the highway from Coffelt Road but that the right to cross over had not been compensated and thus the Commission was enjoined from closing Coffelt Road without condemning the remaining interest of Mrs. Coffelt.

The judicial notice taken could easily have been interpreted by jurors as being in excess of that justified by the decree, and certainly in excess of this court's interpretation of that decree in the first appeal. We need not decide whether the judicial notice thus taken and possibly misleading was error; however, we caution that upon retrial if there is another attempt at condensing the first decree and our opinion affirming it, more care should be taken to see that it is accurately limited.

Reversed on appeal; reversed on cross appeal, and remanded.

Justice Hickman not participating.

# ARKANSAS STATE HIGHWAY COMMISSION *v.* BESSIE W. COFFELT

SUPREME COURT OF ARKANSAS
No. 84-328
Opinion Delivered April 22, 1985
Rehearing Denied May 28, 1985

285 Ark. 431
688 S.W.2d 282

STEELE HAYS, Justice. This is the third appeal of a long-standing dispute between the Arkansas State Highway Commission and Mrs. Bessie W. Coffelt involving the intersection of Coffelt Road and U.S. Highway 67. The background of the litigation is stated in depth in our opinion in *Coffelt v. Arkansas State Highway Commission*, 285 Ark. 314, 686 S.W.2d 786 (1985).

In 1955 the D'Angelos granted an easement for a freeway and frontage road across lands they owned in north Pulaski County where Highway 67 was to be constructed. The conveyance affected all rights of abutment from either side of the freeway, reserving only the right of access to the frontage road and, hence, to the freeway at such points as might be established by the highway department. The D'Angelos later sold their lands to the Coffelts, subject to the easement, and eventually title vested to Mrs. Coffelt alone.

In 1972, Mrs. Coffelt sued the highway department to enjoin a threatened interference with what by then was known as Coffelt Road, at its juncture with Highway 67 alleging in the complaint that an overpass at the Coffelt Road crossing had been promised. As noted in our opinion mentioned above, this contention seems to have been abandoned, though had

an overpass been constructed, it would have resolved any conceivable dispute over the crossing.

In the 1972 phase of this litigation the Chancellor held that Mrs. Coffelt continued to own the fee in the lands involved and he permanently enjoined the commission from interfering with the free use of Coffelt crossing until her remaining interest was acquired by eminent domain or by purchase. That ruling was affirmed on appeal to this court in *Arkansas State Highway Commission* v. *Coffelt*, 257 Ark. 770, 520 S.W.2d 294 (1975).

The case remained in a dormant state until recently when the commission elected to condemn the outstanding interest and eliminate the crossing of Highway 67 at that point. A few days before condemnation proceedings were actually begun, "no turn" signs were erected at both sides of the freeway on Coffelt Road. Mrs. Coffelt petitioned the Chancery Court for citation for contempt of court against the commission members and director, as a result of which the respondents were held to be in contempt and fined $49 each. A later order awarded Mrs. Coffelt's attorney a fee of $700.

The commission has petitioned for certiorari, traditionally the method of reviewing contempt cases. However, since this petition was filed we noted that gradually the distinctions between review of contempt proceedings by certiorari and review by appeal as in other cases have disappeared in all but name — and henceforth review in contempt would be by appeal. *Frolic Footwear* v. *State*, 284 Ark. 487, 683 S.W.2d 611 (1985).

We might easily dispose of this appeal on the basis of a lack of jurisdiction by the trial court to punish for contempt, as there was no personal service on the respondents, nor was there any waiver of that requirement. *Hilltop, Inc.* v. *Riviere*, 268

Ark. 532, 597 S.W.2d 596 (1980); *Nooner* v. *Nooner*, 278 Ark. 360, 645 S.W.2d 671 (1983). But in view of the long history of the case and because the latest, presumably the final, phase is still pending, we prefer to deal with the merit of the substantive issue.

No violation of the restraining order occurred. The highway commission simply posted signs which prohibited vehicles on Coffelt Road from turning onto the freeway, which it had every right to do. There was no attempt to interfere with the right to *cross* the freeway at Coffelt Road, the only right not conveyed by the D'Angelos under their 1955 easement and, thus, the only right acquired by Mrs. Coffelt. See *Coffelt* v. *Arkansas State Highway Commission*, 285 Ark. 314, 686 S.W.2d 786 (1985). True, the wording of the permanent restraining order might have been clearer, as it enjoins the commission "from closing or interfering in any manner with the free use of Coffelt Road crossing or interfering with the flow of traffic on said crossing." But the order must be read in context. *Ferracuti* v. *Ferracuti*, 27 Ill. App. 3d 495, 326 N.E.2d 556 (1975) *Christiano* v. *Christiano*, 131 Conn. 589, 41 A.2d 779 (1945), and in that light the order only restrained the right of *crossing*. That was the only right Mrs. Coffelt had (or for that matter, the only right she even claimed to have when she filed her suit in 1972, in view of her allegation the commission had promised to build an overpass) and any scrutiny into the wording of the original easement, or the background of the case, would have rendered that fact quite clear, *Coffelt* v. *Arkansas State Highway Commission, supra*.

The orders appealed from are reversed and the petition is dismissed.

HICKMAN, J., not participating.

# ARKANSAS STATE HIGHWAY COMMISSION *v.* BESSIE W. COFFELT

SUPREME COURT OF ARKANSAS
No. 74-218
Opinion delivered March 10, 1975

257 Ark. 770
520 S.W.2d 294

J. FRED JONES, Justice. This is an appeal by the Arkansas State Highway Commission from a decree of the Pulaski County Chancery Court enjoining the Highway Commission from closing so-called Coffelt Road where it crosses Highway No. 67 in connection with improvements on Highway 67.

On appeal to this court the Highway Commission relies on the following points for reversal:

> "The trial court erred in finding that there was no notice of the county court order.
>
> The trial court erred in finding that appellee was the title holder in fee of at least 20 feet of the south part of Coffelt Road, which crosses U.S. Highway #67.
>
> The trial court erred in finding that appellant had never entered or attempted to stop the flow of traffic across Coffelt Road to the extent that such entry would amount of [sic] notice that the appellant was claiming said road in fee."

The appellee, Bessie W. Coffelt, has cross-appealed and for reversal of the chancellor's decree on cross-appeal she relies on the following points:

"The trial court erred in dissolving the Temporary Injunction entered August 23, 1972, without the Arkansas Highway Commission affirmatively requesting permission to make a deposit and comply with Per Curiam Order of September 25, 1972.

To comply with Per Curiam Order of Supreme Court of September 25, 1972, Highway Commission must request affirmative relief.

With respect to compensation due process requires that the landowner be given reasonable notice of, and an opportunity to be heard in the proceedings."

The facts, as they appear from the record in this case, are as follows: On July 12, 1955, Horace D'Angelo and his wife owned the land involved in this case and through which the then proposed Highway 67 would run. On that date Pulaski County purchased from the D'Angelos a perpetual easement for Highway 67 over the right-of-way area here involved. The granting clause in the deed from the D'Angelos provided:

". . . do hereby grant and convey unto the said Pulaski County, Arkansas, and unto its successors and assigns forever, a perpetual and exclusive easement for the right of way of State and U.S. Highway No 67 through and over the following described lands lying in Pulaski County, Arkansas as shown on attached sketch marked Exhibit 'A'."

Following the granting clause and description the deed then provided as follows:

"This conveyance is made for the purposes of a freeway and adjacent frontage road and the grantor hereby releases and relinquishes to the grantee any and all other abutter's

rights including rights appurtenant to grantor's remaining property in and to said freeway, provided, however, that such remaining property shall abut upon and have access to said frontage road which will be connected to the freeway only at such points as may be established by public authority.

To have and to hold the same unto the said Pulaski County, Arkansas and unto its successors and assigns forever, with all appurtenances thereto belonging."

On July 25, 1955, the Pulaski County Court entered an order reciting as follows:

"Now on this day there comes on for consideration the matter of right of way damages in connection with the cost of the right of way on the above captioned road project.

And the Court being well and sufficiently advised on all matters of law and fact herein doth find that Pulaski County, Arkansas has entered upon the property of the herein named property owners under authority conveyed by easement deeds executed by the several property owners to said county and that the property acquired and the value thereof expressly including damages to their remaining lands is as follows and said property owners have agreed to accept the following allowance in full settlement of their claims for damages filed in this Court in this matter."

This court order then set out the various amounts to be paid the landowners, including the D'Angelos, and the order concluded as follows:

"IT IS THEREFORE CONSIDERED, ORDERED AND

> ADJUDGED BY THE COURT that the above named property owners recover the amounts shown as total damage and that such allowance is to be paid by Pulaski County, Arkansas from funds made available by the Arkansas State Highway Department which allowances expressly include damages to their remaining lands located outside the right of way."

On September 8, 1955, the D'Angelos sold their entire tract of land consisting of 240 acres, more or less, to Kenneth Coffelt by warranty deed. Following the legal description of the property, this deed provided as follows:

> "[S]ubject to an easement for a road designated as Pickthorn Lane that runs across the North side of said property, if said Lane encroaches in any manner upon the above described property;
>
> Also subject to a perpetual easement for a right-of-way for State and U.S. Highway No. 67 through and over said land, which easement and right-of-way is particularly set forth and described in an instrument described as 'Easement Deed' dated the 12th day of July, 1955, executed by Horace D'Angelo and his wife, Eleanor B. D'Angelo, to Pulaski County, Arkansas, which said deed is recorded in Book 578 at Page 437 of the Deed Records of Pulaski County, Arkansas. The highway right-of-way *excepted from this conveyance* and described in the Easement Deed above referred to contains 27.92 acres more or less in permanent right-of-way and 1.508 acres more or less in temporary right-of-way." (Emphasis added).

This deed also contains a warranty clause as follows:

> "And we hereby covenant with the said Kenneth Coffelt that we will forever warrant and defend the title to said

lands against all claims whatsoever except the easements set forth in the *granting clause*, and the rights of Herman Berkhead, Jr., a tenant by the month, who is now occupying the tenant house on said property." (Emphasis added).

On December 16, 1955, the Pulaski County Court entered an order finding that for the purpose of constructing, improving and maintaining U.S. Highway No. 67, the highway should be a controlled access facility for the reason that traffic conditions then and those contemplated and forecast for the future justify such special facility, "and therefore the owners or occupants of abutting land shall have no right or easement of existing, future, or potential common law or statutory rights of access, or ingress and egress to, from, or across this facility to or from abutting lands, except at such designated points at which access may be permitted upon such terms and conditions as may be specified from time to time by the Arkansas State Highway Commission." The county court then found that under the provisions of said Act 383 of 1953 the said right-of-way should be acquired in fee simple. The county court order then provided as follows:

"IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED BY THE COURT that:

1. The right of way for the Jacksonville Air Base-North Road, U.S. Highway No. 67, be and the same is hereby condemned, located and changed in accordance with the description hereto attached and as shown on the right of way sketch map hereto attached, and that the title to said lands in fee simple absolute is hereby vested and confirmed in Pulaski County, Arkansas.

2. That the said Jacksonville Air Base-North Road, U.S. Highway No. 67, be and is hereby designated and

established a controlled-access facility under the authority of and as provided by Act 383 of the 1953 General Assembly of the State of Arkansas, and that the owners or occupants of abutting and adjoining lands shall have no right or easement of existing, future, or potential common law or statutory rights of access, or ingress and egress to, from, or across this facility to, from, or across abutting lands, except at such designated points and places at which access may be permitted by the rules and regulations of the Arkansas State Highway Commission which Commission is hereby permitted to regulate, control and designate such access, light, air or view and points and places of ingress and egress.

3. That the right of way herein described has been obtained by Pulaski County, Arkansas for the public use and benefit and for this purpose the property rights acquired under this order be and they are hereby transferred to the Arkansas State Highway Commission to construct and maintain said road, being a controlled-access facility."

Kenneth Coffelt subsequently transferred title by quit-claim deed to the appellee, Bessie W. Coffelt. On August 23, 1972, Mrs. Coffelt filed the present action in chancery court praying that the appellant and its contractors be temporarily restrained from interfering with the existing exit off of U.S. Highway 67 and its east frontage road abutting the property owned by her, and that upon final hearing the order be made permanent, and praying that the Highway Commission be required to deposit estimated damages into the registry of the court if it proposed to condemn the property right of the appellee in the exit in question. The complaint alleged that the appellee's land had a one-fourth mile frontage along U.S. Highway 67; that the right-of-way was acquired by easement deed to Pulaski County by the appellee's predecessor in title;

that the exit in question was from the two north-bound lanes of traffic on U.S. Highway 67 to a two-lane frontage road running directly in front of appellee's property, and that the closing or removal of said exit would deprive the appellee of a property right to her damage in the amount of $46,375. The complaint also alleged representations made as to the permanency of the exit. A temporary injunction was entered by the trial court as requested in the complaint.

On September 6, 1972, the appellant filed its answer denying most of the allegations in the complaint; denying the appellee's fee ownership in the right-of-way, and denying that the appellee would be deprived of access from the main travel portion of the highway to the frontage road upon which the appellee's property abuts.

On September 18, 1972, the appellee filed a motion asking the court to require the appellant and its contractors to deposit $46,375 before they tore out ramps, exits or entrances to the highway on the access road abutting appellee's property, or the closing of Pickthorn or Coffelt Road. The motion alleged that to permit the tearing out of the ramps and to close Coffelt Road without making deposit subject only to the orders of the court, was taking her property without compensation in violation of the State and Federal Constitutions.

On September 18, 1972, the chancellor dissolved the temporary injunction previously ordered and recited retention of jurisdiction for determination "upon permanent hearing" of what damages, if any, should be awarded the appellee.

On September 19, 1972, the chancellor denied the appellee's motion for deposit of estimated damages, whereupon, the appellee filed notice of appeal to this court and on September 25, 1972, this court entered its order reciting as follows:

"The temporary restraining order entered by the Chancery Court on August 23, 1972, is reinstated and shall remain in effect *until this case is disposed of or until* the appellees have either filed an eminent domain proceeding or shall have deposited an adequate amount (to be determined by the chancery court) to compensate the appellant for any damages or compensation to which she may be found to be entitled upon final adjudication of the issues between the parties." (Emphasis added).

On September 29, 1972, the appellee amended her complaint alleging that Coffelt Road intersects Highway 67 and that such crossover constituted a fixed property right of the plaintiff; that she is the owner of the fee title thereto; that said crossover was the only means by which she could get from her property on one side of Highway 67 to the other side; that the Highway Commission was planning to close said Coffelt Road where it crossed Highway 67; that the Highway Commission had agreed to build an overpass at said crossing, and that if the Highway Commission elected to condemn said crossing by eminent domain, it should be required to deposit the sum of $285,000 as just compensation for the taking.

On September 29, 1972, the chancery court entered an order restraining the appellant and its contractors from interfering in any manner with Coffelt Road crossing and setting the matter for hearing on the merits for October 3, 1972. On October 18, 1972, the Highway Commission filed its answer to amendment to the complaint denying the allegations set out in the amendment and stating that the closing of Coffelt Road was for the purpose of diverting and rerouting traffic for the safety of the public, and that such action did not constitute a taking of any compensable property right held by the plaintiff.

On August 22, 1973, the appellee amended her amend-

ment to the complaint alleging that she was the fee owner of the Coffelt Road crossing and also held a prescriptive right of ownership along with all other members of the traveling public to said crossing. She alleged that the Coffelt Road crossing was a county road maintained by the county, being a blacktop road with a 40 foot right-of-way over which school bus and mail routes were being operated and had been operated for a quarter of a century, and that the original and exclusive jurisdiction of said road rests with the County Judge. She alleged that the Highway Commission has no right to interfere with the Coffelt Road crossing under any proceedings because it had not applied to the county court for permission to so interfere with the crossing and, no order had been entered by the county granting such permission. She alleged that the county court is given exclusive jurisdiction of the closing under its exclusive jurisdiction relating to county roads under Section 28 of Article 7 of the State Constitution. The appellee further alleged that "Even the circuit court could not entertain a condemnation plea by the appellant to take the road or crossing."

On April 17, 1974, the chancellor entered a decree which, among other things, found the appellee to be the holder in fee subject to the easement of Pulaski County, Arkansas, "of at least 20 ft. of the South part of what is known as Coffelt Road, which crosses Highway #67 a four-lane highway." The court then decreed as follows:

> "1. The defendants, Arkansas State Highway Commission and E. C. Rowlett Construction Co., Inc., and each of them are hereby permanently restrained and enjoined from closing or interfering in any manner with the free use of Coffelt Road Crossing or interfering with the flow of traffic on said crossing. The temporary injunction pertaining to said crossing heretofore entered in this cause is hereby made permanent.

2. That the plaintiff, Bessie Coffelt, has suffered no damage nor will the plaintiff, Bessie Coffelt, suffer damage by virtue of any construction or proposed construction of the exit or entry ramps by the Arkansas State Highway Commission within the 300 ft. right-of-way acquired by Pulaski County from D'Angelos on July 12, 1955, and she will not suffer any damages by the defendants tearing out the present existing exit ramp involved in this case and therefore the Temporary Injunction heretofore entered against the defendants pertaining to said ramp is hereby dissolved."

In the posture this case is presenting to us on appeal, the appellant's second and third points for reversal are really dependent upon the first point. The appellant argues that construction on Highway 67 was begun in 1956 or 1957 following entry of the county court order of December 16, 1955; that the appellee's husband, Kenneth Coffelt, held title to the property at the time the condemnation order was entered; consequently, the entry in 1956 or 1957 under the county court order was notice to the appellee that the Highway Commission was claiming title under the court order. The appellant argues inferentially that the twelve months statute of limitations under Ark. Stat. Ann. § 76-926 (Supp. 1973) was set in motion by such entry and any claim for damages the appellee might otherwise have had, was barred by limitations when her petition was filed in this case.

Thus, as we understand the contentions of the parties presented under the points the appellant has designated, the question on this appeal is narrowed to whether the statute of limitations has run on any claim for damages the appellee may have for the taking of the *fee title* involved under the county court order of December 16, 1955.

In *Ark. State Highway Comm'n* v. *French*, 246 Ark. 665,

438 S.W. 2d 276, we reviewed some of our previous decisions pertaining to when the statute of limitations begins running against a claim of the nature here involved and our conclusion as recited in the *French* case is as follows:

> "As we read these decisions the one year statute of limitations does not begin to run against a property owner until he is served with notice by legal process or until an entry is made by the condemning agent."

It is apparently conceded that the Coffelts were not served with notice by legal process pursuant to the aforesaid county court order. Consequently, the question is whether the entry by the Highway Commission on the land involved constituted such notice as to set in motion the statute of limitations. We are of the opinion that it did not under the facts in this case. The Highway Commission had a perfect right, which no one questions, to enter into possession and construct the highway under the right-of-way easement deed from the D'Angelos to Pulaski County. There is nothing in the record to place the appellee on notice that the appellant, by its entry onto the property involved, was entering the property under a claim of fee title. All of the appellant's actions were consistent with the rights it acquired under the easement deed from the appellee's predecessors in title. Whether or not the appellee would be damaged by the taking of the *fee*, beyond or in addition to the rights the appellant acquired by easement deed, is a matter yet to be determined, but a matter which the appellee has a right to have determined and upon which the statute of limitations has not run in this case.

We do not pass upon the effect of the various deeds on damages claimed in this case, but we are of the opinion the chancellor's finding that the appellee owns the fee title to at least twenty feet of Coffelt Road is not against the preponderance of the evidence. We conclude, therefore, that the

chancellor did not err in granting the injunction until the question of damages, if any, is fully determined.

As to the points relied on by the appellee on cross-appeal, we are of the opinion the chancellor was correct in dissolving the temporary injunction entered on August 23, 1972, without the Arkansas Highway Commission affirmatively requesting permission to make a deposit and comply with this court's per curiam order dated September 25, 1972. The per curiam order of this court did not hold that the Highway Commission must request affirmative relief as argued by the appellee. We only held in our per curiam order that the restraining order entered by the chancellor on August 23 be reinstated and "remain in effect *until this case is disposed of or until* the appellees have either filed an eminent domain proceeding or shall have deposited an adequate amount," etc. (Emphasis added). The chancellor's findings that "There has been no loss of ingress or egress to the plaintiff by virture of any construction or proposed construction of the exit or entry ramps on Highway #67, and, therefore, the plaintiff would not be entitled to any damages," is not against the preponderance of the evidence. Consequently, we affirm the chancellor's decree on the appeal as well as on cross-appeal.

The decree is affirmed.

Supplemental Opinion on Denial of
Rehearing delivered June 2, 1975
522 S.W.2d 839

The Court erred in overruling principles of law announced in the case of *Arkansas State Highway Commission* v. *Palmer*, 222 Ark. 603, 261 S.W. 2d 772, and *The State Life Insurance Company of Indianapolis, Indiana* v. *Arkansas State Highway Commission*, 202 Ark. 12, 148 S.W. 2d 671. The principles of law were (1) that where a county condemns land

for highway purposes upon petition of the Arkansas State Highway Commission, the county becomes liable for damages arising from the county court order and not the Arkansas State Highway Commission; (2) where appellees have a remedy at law in that they can pursue their claim against the county for damages arising from the county court order, equity should not grant an injunction.

In argument, appellant says that we held that the statute of limitations had not run against appellee and that appellee still has a right to determination of her damages resulting from the taking of the fee title by the county court order, but complains that we overlooked the fact that appellee's claim for damages is against the county and not appellant under our holding in *Arkansas State Highway Commission* v. *Palmer*, 222 Ark. 603, 261 S.W. 2d 772. Thus, says appellant, appellee had an adequate remedy at law and injunction was improper under our holding in *The State Life Insurance Company of Indianapolis, Indiana* v. *Arkansas State Highway Commission*, 202 Ark. 12, 148 S.W. 2d 671.

In spite of the fact that we said in our original opinion that appellee still owns the fee, appellant correctly interprets the effect of our holding in that, regardless of who may be said to be the owner of the fee, appellant cannot proceed to use the area until just compensation has been paid or secured to appellee.

Appellee has asserted rights in the Coffelt Road Crossing at least from September 18, 1972 when she moved that appellant be required to deposit $46,375 in the registry of the court, saying that closing the road at the intersection with Highway 67, without doing so would constitute a taking of private property without compensation in violation of the constitutions of Arkansas and of the United States. By an amendment to her complaint, she asserted that the first notice to appellee of appellant's intention to enter upon and close the

crossing was on September 13, 1972, and that she would be damaged in the amount of $285,000. Appellant's answer was that the closing of Coffelt Road was a rerouting of traffic and a valid exercise of its police power.[1] In seeking to have vacated a temporary injunction restraining appellant from interfering with appellee's use of Coffelt Road crossing until appellant either deposited in the registry of the court a sum of money sufficient to cover the amount of appellee's damages or filed a condemnation proceeding taking the crossing, appellant again relied only on the police power. In its brief on this motion, appellant first mentioned the county court order, saying that appellee at that time (December 16, 1955) had no standing to seek compensation for any damages resulting from the action proposed by appellant. Appellant again relied upon its police power and asserted that under *Arkansas State Highway Commission* v. *Bingham*, 231 Ark. 934, 333 S.W. 2d 728, there was no compensable damage to appellee, since the highway had been designated in the county court order as a controlled access facility. Appellee again amended her complaint to allege fee ownership of the crossing and a prescriptive right of ownership and use of it. Appellant's answer consisted principally of a denial of these allegations.

In the court's decree of April 17, 1974, there was a specific finding that there had been neither notice of taking of Coffelt Road crossing nor entry upon it. Appellant's motion for reconsideration in the trial court was upon these issues principally. Otherwise it amounted to a restatement of positions previously taken by it.

Never at any time did appellant raise the issue it now asserts on petition for rehearing in the trial court. As will be seen from its statement of points, it never raised the issue in its

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[1]But see *Arkansas State Highway Commission* v. *Union Planters Bank*, 231 Ark. 907, 333 S.W. 2d 904.

brief on appeal. Neither of the cases now relied upon was cited until the filing of the reply brief. There appellant cited *Palmer* and asserted for the first time, that Pulaski County and not appellant, was liable for any claim of appellee for just compensation. This was too late. It was an issue raised for the first time on appeal. *State Life Insurance Co.* v. *Arkansas State Highway Commission*, supra, was never mentioned. We cannot now consider this issue and we have not overruled either case. Furthermore, we do not perceive any error or conflict with *State Life Insurance Co.* v. *Arkansas State Highway Commission*, supra. As a matter of fact, it was recognized in *Palmer* that the chancery court might do what it did. There we said:

> . . . while the property owner may not sue the state or the commission acting in its name for damages, he may restrain the commission from taking his property until the damages have been paid, or provision for payment made.

In *Palmer* both the county court and the circuit court had rendered judgment against both the county and the highway department.

It was certainly within the jurisdiction of a court of equity to enjoin appellant from trespassing upon or appropriating the property of a landowner when the right to compensation had been denied because the fiscal year in which a county court's order of condemnation was issued had expired and the revenues exhausted, leaving the landowner without an adequate remedy at law. *Arkansas State Highway Commission* v. *Hammock*, 201 Ark. 927, 148 S.W. 2d 324. See also, *Arkansas State Highway Commission* v. *French*, 246 Ark. 665, 439 S.W. 2d 276; *Arkansas State Highway Commission* v. *Cook*, 236 Ark. 251, 365 S.W. 2d 463. In *Hammock*, we said that the chancery court erred in holding that the county court order was void, but

we affirmed the injunction there issued insofar as it enjoined appellant from taking the land until the landowners were compensated. In *French*, as here, there had been no entry upon the property before the decree was entered.[2] In *Cook*, 35 years had elapsed between the county court order and appellant's undertaking to take possession of a disputed ten foot strip not entered upon at the time of the county court order.

Another case similar to ths one is *Arkansas State Highway Commission* v. *Anderson*, 234 Ark. 774, 354 S.W. 2d 554, where the county court order was 25 years old at the time appellant sought to enter upon right-of-way beyond the limits of that it had been using. We sustained a decree enjoning the Highway Department from going on the strip involved or attempting to use the same. Although it was clearly proper for the chancery court to enjoin appellants from entering upon the crossing until whatever compensation was due appellee has been paid or secured, it may well be that appellee has recourse to the county court under the authorities hereinabove cited and such cases as *Miller County* v. *Beasley*, 203 Ark. 370, 156 S.W. 2d 791 and *Arkansas State Highway Commission* v. *Croom*, 225 Ark. 312, 280 S.W. 2d 887. Appellant simply did not raise the question in the trial court and raised it belatedly here. The ownership of the fee is not material; appellee's right to a day in court on just compensation is. There has not been either legal notice of the taking or entry by appellant, and there will not be as long as the injunction is in effect.

We cannot reverse the decree on an issue not raised.

SMITH and BYRD, JJ., concur only in the denial of the rehearing.

JONES, J., would grant the rehearing.

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[2]As pointed out in our original opinion in this case, the entry made upon the right-of-way at the time of the original construction was not inconsistent with the easement and thus insufficient to serve as notice of the rights appellant claims.

# TEXT OF CITED CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

**Amendment 9, Arkansas Constitution**

The Supreme Court shall be composed of five [5] judges, one [1] of whom shall be styled chief justice and elected as such, any three [3] of whom shall constitute a quorum, and the concurrence of at least three [3] judges shall in every case be necessary to a decision. Provided, if it should hereafter become necessary to increase the number of judges of the Supreme Court, the legislature may provide for two [2] additional judges and may also provide for the court sitting in divisions under such regulations as may be prescribed by law; provided, further, that should the court sit in divisions, in all cases where the construction of the Constitution is involved, the cause shall be heard by the court in banc, and in all cases where a judge of a division dissents from the opinion therein, at the request of the chief justice, or such dissenting justice, the cause shall be transferred to the court in banc for its decision. [Const. Amend. No. 9, § 1; Pope's Dig., § 2724.]

**Ark. Stat. 22-201**

It having become necessary to increase the number of judges of the Supreme Court of Arkansas, two [2] additional judges are hereby provided for, whose terms shall begin January first, 1927 and who shall be elected at the next general election held in this state for the election of state and county officers. Said judges shall be elected for the term now provided by law for Supreme Court judges, shall receive the same salary as other justices and each shall be entitled to one [1] stenographer who shall receive the same salary in amount as stenographers of other Supreme Court stenographers [justices].

The annual salaries of the justices of the Supreme Court of Arkansas shall be $15,000 per annum, which salary shall be paid monthly by the state of Arkansas, through its auditor of state, out of funds appropriated for such purposes, and said sums shall be due and payable to said justices as of January 1, 1957. [Acts 1925, No. 205, § 1, p. 597; Pope's Dig., § 2724; Acts 1957, No. 17, § 1, p. 65.]

**Ark. Stat. 22-206**

The court may sit in two [2] divisions to be designated Division No. 1 and Division No. 2, to be composed of three [3] justices in each division. The chief justice shall alternate in presiding over these divisions and in addition shall have a vote and the same power as an associate justice. At each sitting the division not being presided over by the chief justice shall be presided over by the justice in that division having the highest seniority by reason of service as such justice. In all cases where the construction of the state constitution is involved, or in a capital criminal case, the cause shall be heard by the court in banc. In each case heard by the court in banc the concurrence of four [4] judges shall be necessary to a decision. [Acts 1925, No. 205, § 2, p. 597; Pope's Dig., § 2725.]

**Ark. Stat. 76-533**

The State Highway Commission may exercise its power of eminent domain by filing an appropriate petition in condemnation in the circuit court of the county in which the property sought to be taken is situated, to have the compensation for right-of-way determined, giving the owner of the property to be taken at least ten (10) days' notice in writing of the time and place where such petition will be heard. In case the property sought to be condemned is located in more than one county, the petition may be filed in any circuit court having jurisdiction in any county in which the whole or part of

such property may be located, and the proceedings had in such circuit court will apply to all such property described in the petition. If the owner of the property sought to be taken be a nonresident of the State, such notice shall be by publication in any newspaper in said county which is authorized by law to publish legal notices, which notice shall be published for the same length of time as may be required in other civil causes. If there be no such newspaper published in the county, then said publication shall be made in some such newspaper designated by the circuit court clerk, and one [1] written or printed notice thereof posted on the door of the court house of such county.

Where the immediate possession of lands and property is sought to be obtained, the State Highway Department may file, together with the condemnation petition, or at any time before judgment, a declaration of taking, as provided by law.

In all cases of infants or persons of unsound mind, when no legal representative or guardian appears in their behalf at the hearing, it shall be the duty of the court to appoint a guardian ad litem, who shall represent their interest for all purposes.

The condemnation petition shall describe the lands and property sought to be acquired for State Highway right-of-way purposes and shall be sworn to.

It shall be the duty of the circuit court to impanel a jury of twelve (12) men, as in other civil cases, to ascertain the amount of compensation which the State Highway Department shall pay, and the matter shall proceed and be determined as in other civil cases. [Acts 1953, No. 419, § 2, p. 1188.]

**Rule 9, Rules of Supreme Court and Court of Appeals of Arkansas**

ABSTRACTS AND BRIEFS, CONTENTS

**(a) Indexing Optional —** It is not required that abstracts and briefs be indexed, but when the abstract or brief is unusually long an index inserted at the beginning is recommended.

**(b) Statement of the Case. —** After the index, if any, the appellant's abstract and brief shall begin with a concise statement of the case, witout argument. This statement, ordinarily not exceeding two pages in length, should be sufficient to enable the court to read the abstract with an understanding of the nature of the case, the general fact situation, and the action taken by the trial court. The appellee's brief need not contain a statement of the case unless the appellant's statement is controverted or deemed insufficient.

**(c) Points and Authorities. —** Following his statement of the case the appellant shall list and separately number, concisely and without argument, the points relied upon for a reversal of the judgment or decree. The appellee will follow the same sequence and arrangement of points as contained in appellant's brief, and may then add additional points. Either party may insert under any point not more than two citations which he considers to be his principal authorities on that point.

**(d) Abstract. —** The appellant's abstract or abridgment of the records should consist of an impartial condensation, without comment or emphasis, of *only* such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all

questions presented to this court for decision. On a second or subsequent appeal, the abstract shall include a condensation of all pertinent portions of the record filed on any prior appeal. Not more than two pages of the record shall in any instance be abstracted without a page reference to the record. In the abstracting of testimony, the first person rather than the third person shall be used. The Clerk will refuse to accept a brief that is not abstracted in the first person or that does not contain the required references to the record. In the abstracting of depositions taken on interrogatories, requests for admissions and the responses thereto, and interrogatories to parties and the responses thereto, the abstract of each answer must immediately follow the abstract of the question. Whenever a map, plat, photograph, or other similar exhibit, which cannot be abstracted in words, must be examined for a clear understanding of the testimony, the appellant shall reproduce such exhibit by photography or other process and attach such reproduction to the copies of the abstract filed in this court and served upon the opposing counsel, unless this requirement is shown to be impracticable and is waived by the court upon motion.

**(e) Insufficiency of Appellant's Abstract.** — Motions to dismiss the appeal for insufficiency of the appellant's abstract will not be recognized. The court, in this tentative revision of Rule 9(e), anticipates that deficiencies in the appellant's abstract will ordinarily come to the court's attention and be handled in either of two ways:

(1) If the appellee considers the appellant's abstract to be defective, he may, in his printed brief, call the deficiencies to the court's attention and, at his option, may submit a supplemental abstract. When the case is considered on its merits the court may impose or withhold costs to compensate either party for the other party's noncompliance with this Rule. In seeking an award of costs under this paragraph, counsel must submit a statement by the printer showing the

cost of the supplemental abstract and a certificate of counsel showing the amount of time that was devoted to the preparation of the supplemental abstract.

(2) Whether or not the appellee has called attention to deficiencies in the appellant's abstract, the court may treat the question when the case is submitted on its merits. If the court finds the abstract to be flagrantly deficient, or to involve an unreasonable or unjust delay in the disposition of the appeal, the judgment or decree may be affirmed for noncompliance with the Rule. If the court considers that action to be unduly harsh, the appellant's attorney may be allowed time to reprint his brief, at his own expense, to conform to Rule 9 (d). Mere modifications of the original brief, as by interlineation, will not be accepted by the Clerk. Upon the filing of such a substituted abstract and brief by the appellant, the appellee will be afforded an opportunity to revise or supplement his brief, at the expense of the appellant or his counsel, as the court may direct.

**(f) Briefs.** — Arguments shall be presented under subheadings numbered to correspond to the outline of points to be relied upon. Citations of decisions of this court which are officially reported must be from the official reports. All citations of decisions of this or any other court must state the style of the case, as well as the book and page; and if reported in different form by more than one publisher, each should be cited, although this is not mandatory.

**(g) Cover for Briefs.** — On the cover of every brief there should appear the number and style of the case in this court, a designation of the court from which the appeal is taken and the name of its presiding judge, the title of the brief (e.g., Abstract and Brief for Appellant) and the name or names of counsel filing such brief. (Amended by Per Curiam, February 9, 1976; Amended by Per Curiam, September 20, 1976.)